

Supreme Court, U.S.
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No. 82-1653

Alexander L. Stoye, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

JAMES MITCHELL NEWMAN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit**

**SUPPLEMENTAL MEMORANDUM OF PETITIONER
JAMES M. NEWMAN**

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September 27, 1983

IN THE
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In connection with the Court's consideration of the Petition for a Writ of Certiorari in the above-captioned matter, petitioner James M. Newman would like to inform the Court of the decision by the Court of Appeals for the Second Circuit of a related civil case. On September 9, 1983, the Second Circuit decided the case of *Moss v. Morgan Stanley Inc.*, No. 83-7120, a civil action brought against petitioner and others under, *inter alia*, Section 10(b) of the Securities Exchange Act of 1934 and S.E.C. Rule 10b-5.

Plaintiffs in *Moss* were persons with whom petitioner had no relationship but who sold securities on the open market at the same time petitioner was purchasing like securities while allegedly in possession of material non-public information regarding an impending tender offer for those securities. Petitioner allegedly obtained this information from employees of Morgan Stanley Inc., which was advising the potential bidder. These purchases by petitioner were among those used as evidence against him in the case now before the Court on petition for a writ of certiorari.

Relying on the Supreme Court's decisions in *Chiarella v. United States*, 445 U.S. 222 (1980), and *Dirks v. S.E.C.*, 51 U.S.L.W. 5123 (U.S. July 1, 1983), the Second Circuit affirmed the district court's dismissal of these actions against petitioner because petitioner "owed no duty of disclosure" to plaintiff. Slip op. at 16. Petitioner and the employees of Morgan Stanley were not "traditional 'corporate insiders,'" and had not received any confidential information from the target. *Id.* Instead, "like Chiarella and Dirks, the defendants were 'complete stranger[s] who dealt with the sellers . . . only through impersonal market transactions'." *Id.*, citing *Chiarella*.

The Court of Appeals also rejected the "misappropriation" theory of Rule 10b-5 liability put forward by plaintiff. The court described plaintiff's argument as a theory "that any person who 'misappropriates' information owes a general duty of disclosure to the entire marketplace." *Id.* at 17. Citing the Supreme Court's decision in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), the court rejected this argument because "the Supreme Court has made clear that section 10(b) and rule 10b-5 protect investors against *fraud*; they do not remedy every instance of undesirable conduct involving securities." *Id.* at 18 (emphasis in original). And since the defendants "owed no duty of disclosure to plaintiff Moss, they committed no 'fraud' in purchasing shares of [the target

company's] stock." *Id.* The court concluded that "plaintiff's 'misappropriation' theory clearly contradicts the Supreme Court's holding in both *Chiarella* and *Dirks*," and therefore the complaint "fails to state a valid section 10(b) or rule 10b-5 cause of action." *Id.* at 19.

Respectfully submitted,

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